Service Date: August 22, 1991

DEPARTMENT OF PUBLIC SERVICE REGULATION
BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER of the Application	)	TRANSPORTATION DIVISION
by Big Z, Inc., Billings, Montana,	)	
for a Montana Class B Intrastate	)	DOCKET NO. T-9511
Certificate of Public Convenience	)	
and Necessity.	)	ORDER NO. 6019a

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FINAL ORDER

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TABLE OF CONTENTS

APPEARANCES

FOR THE APPLICANT:

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FOR THE PROTESTANTS:

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Jerome Anderson, P.O. Box 866, Helena, Montana 59624, appearing on behalf of Dixon Brothers, Inc.

FOR THE COMMISSION:

Martin Jacobson, Staff Attorney, 2701 Prospect Avenue, Helena, Montana 59620

BEFORE:

Ivan C. Evilsizer, Staff Attorney and Hearing Examiner

FINAL ORDER BEFORE:

HOWARD L. ELLIS, Chairman
DANNY OBERG, Vice Chairman
BOB ANDERSON, Commissioner
JOHN B. DRISCOLL, Commissioner
WALLACE W. "WALLY" MERCER, Commissioner

INTRODUCTION

On February 1, 1990 Big Z, Inc. (Big Z), filed an Application for Intrastate Certificate of Public Convenience and Necessity before the Montana Public Service Commission

(PSC). The application proposed operations by Big Z as a "Class B" intrastate motor carrier providing services "between all points and places in the state of Montana" in the transportation of "petroleum, petroleum byproducts, LPG, crude, and residual fuels." The application was accompanied by an Application for Intrastate Temporary Operating Authority.

On February 16, 1990 the PSC advised Big Z by letter that it had submitted no fee with the application for temporary authority, it had not submitted the original statements of shipper support for the permanent authority or any statements for the temporary authority, and the PSC needed written verification of Big Z's intentions on Big Z's pending Docket No. T-9426 (coal authority). On February 20, 1990 Big Z submitted the fee, stated its intentions to provide the appropriate statements of shipper support, and formally requested withdrawal of Docket No. T-9426. The statements of shipper support were then provided by Big Z on March 7, 1990.

On March 7, 1990 notice of the application of Big Z was made by the PSC's monthly notice to all interested persons and provided to various newspapers for publication.

On March 12, 1990 the PSC denied Big Z's application for temporary operating authority.

By March 26, 1990 protests to the application of Big Z had been filed by W.R. Drinkwalter and Sons Trucking, Inc. (Drinkwalter), Keller Transport, Inc. (Keller), Black Hills Trucking, Inc. (Black Hills), Hornoi Transport, Inc. (Hornoi), Dixon Bros., Inc. (Dixon Bros.), S-B Transportation, Inc. (S-B), and Sorlie Trucking, Inc. (Sorlie).

On March 21, 1990 a Proposed Procedural Order was issued. On March 26, 1990 this became the Procedural Order setting schedules for discovery and hearing. On April 13, 1990

notice of hearing on Big Z's application was served on all parties and mailed to various newspapers for publication.

On April 23, 1990 the PSC designated Ivan C. Evilsizer as hearing examiner for Big Z's application. This appointment was not made by request of any party, but on the PSC's own motion. No objections to this appointment were made. See generally, ARM 38.2.3601 through 38.2.3603, for procedure and authority for hearing examiners.

On May 4, 1990 Big Z and Black Hills, filed a Stipulation to Amend Application. Pursuant to that, Black Hills withdrew its protest and Big Z agreed that its request for authority before the PSC would be amended to prohibit transportation of Mercer type commodities.

On May 8, 1990 a hearing was commenced. This time was within the 60 day from protest requirement. See generally, Section 69-12-321, MCA. This hearing was continued at the request of Big Z, with agreement of the Protestants. Big Z waived the 180 day deadline for a final order. See generally, Section 69-12-323, MCA.

On May 25, 1990 a Second Procedural Order was issued setting new schedules for discovery and a prehearing confer ence. On June 1, 1990 a Third Procedural Order was issued setting new schedules for discovery, prehearing matters and hearing. On June 26, 1990 notice of hearing on Big Z's application was served on the parties and mailed to various newspapers for publication.

On July 24, 1990 a hearing was commenced. Testimony and exhibits from all parties were received. The hearing continued through July 25, 1990 at which time a briefing schedule was established.

Big Z and the Protestants filed proposed findings of fact, conclusions of law, and orders or briefs.

On February 28, 1991 Hearings Examiner Ivan C. Evilsizer issued the Proposed Order in this docket, Docket No. T-9511, Order No. 6019 (further reference will be by paragraph number and this Proposed Order number). The Proposed Order denied Big Z's application for a Certificate of Public Convenience and Necessity (motor carrier authority) to operate Class B intra-state between all points and places in the state of Montana in the transportation of petroleum, petroleum by-products, LPG, crude, and residual fuels. Exceptions to the Proposed Order have been made by Big Z. The Protestants have replied to the exceptions.

In issuance of this Final Order from the Proposed Order and Exceptions, the PSC may adopt the Proposed Order or reject or modify conclusions of law and findings of fact. The only qualification to this is that, in regard to findings of fact, the PSC must first determine that they were not based on competent substantial evidence or the underlying proceedings did not comply with essential requirements of law. See generally, Section 2-4-621(3), MCA.

As its Final Order in this docket, the PSC adopts the Proposed Order with modifications to (a) findings of fact and conclusions of law for the purpose of addressing, granting, or overruling exceptions and arguments raised and (b) form and text, where necessary, to place this order in context of a Final Order. For convenience, modifications, except those merely placing this order in context of a Final Order, are explained with reference to the Proposed Order paragraphs. This Final Order generally follows the format and order of discussion contained in the Proposed Order.

PENDING MATTERS

Background

Several procedural or evidentiary matters remain pending insofar as a ruling is necessary. These include objections or motions taken under advisement, testimony or exhibits received subject to later ruling, and any other similar issue or matter pending or needing clarification.

Relevance of Certain Evidence

At hearing the PSC is required to allow Big Z every reasonable opportunity to prepare and present its affirmative case. In this regard, the normal course of events in hearings on applications for authority has been that the parties provide evidence on the Applicant's fitness, a public need for the authority, that the public need cannot be filled by existing carriers, and no harm will occur to existing transportation services if authority is granted. In this particular case, Big Z presented, or attempted to present, evidence on some unusual or additional factors. These factors include fitness of the protestants as existing carriers, existing carrier price fixing or price cutting practices, discrimination, unreasonable state and federal auditing practices, minority status, and disadvantaged business status. All of these matters at one point or another in the hearing were met by objection or motion. Insofar as any were not finally resolved at the time of objection or motion, were subject to a continuing objection not ruled upon, were taken under advisement, or taken subject to a later ruling, a ruling is necessary at this time.

The PSC affirms the Proposed Order on all of the above points, with explanation. However, it should be noted by all parties that although the rulings exclude certain evidence from this proceeding, if the issues to which the evidence relates are properly raised in some appropriate

future proceeding and the evidence that is excluded or similar evidence is again submitted and determined to be fact, the consequences could have a serious impact.

Concerning fitness of the Protestants as existing carriers, all evidence will be excluded, as evidence bearing on the fitness of existing carriers for the purpose of establishing inability to serve the public or inadequate service to the public is irrelevant to this proceeding. If it is the case that existing carriers lack fitness, it is a matter for formal complaint before the PSC, not an application for authority. This type of complaint, if warranted, would most properly be from shippers, not competing carriers.

In the above paragraph (> 15, Order No. 6019), the Hearings Examiner ruled to exclude evidence concerning fitness of existing carriers as being irrelevant to the application proceeding and stated that the fitness of existing carriers is a matter for formal complaint by shippers. Big Z argues on exceptions that the fitness of existing carriers is crucial to a fair and honest assessment of its application for authority and that the PSC must consider the fitness of existing carriers in applications for authority. The PSC agrees with the Hearings Examiner, but also agrees with Big Z, in part. The following is supplementary reasoning.

"Fitness," as that term is customarily used in applications for authority, applies only to the applicant. Fitness is a determination based on evidence demonstrating that the applicant most probably has the resources and ability to provide adequate services as a motor carrier on a regular and permanent basis. In this sense it constitutes a prediction that adequate service can and will be performed.

In this context "fitness" is inapplicable to existing carriers. Existing carriers are actually conducting operations as motor carriers and the adequacy of their service can be, or actually is, evident by those operations. There is no need to attempt to accurately predict anything in regard to existing carriers. Even if it were the case, any prediction would be overridden by actual practice. Therefore, the standard that existing carriers must maintain is not fitness as a prediction but adequate service in actuality.

Upon review of this matter it is clear that the Hearings Examiner properly ruled. Big Z's attempts to demonstrate that the existing carriers' resources and abilities in and of themselves, without evidence of specific instances of shipper dissatisfaction proves nothing of consequence and nothing in issue and is therefore irrelevant. No applicant for authority can prove inadequacy of service by existing carriers by "fitness" type evidence.

In addition, a review of the record discloses that every reasonable courtesy on this matter was extended to Big Z over objection and pending ruling on objection, but was, in effect, wasted on things such as general theories of engineering structural analysis in the abstract with no direct connection to the existing carriers resources or abilities whatsoever. Without more, even if "fitness" were an issue, such evidence could not be used to determine anything as to the existing carriers unless it were specific as to each existing carrier.

Concerning "adequacy of service" of existing carriers, the PSC agrees with Big Z that such can and should be a matter of concern in applications for authority. However, if Big Z is arguing that it is not a matter of concern, presently, the PSC disagrees. Adequacy of service of existing carriers is a crucial part of all applications for authority. However, to reiterate, adequacy

of service will not be determined from fitness evidence -- such would be based in conjecture only, a leap no trier of fact would reasonably make in the face of apparent adequate service in practice.

Concerning alleged existing carrier price fixing or price cutting, all evidence will be excluded as it is also irrelevant to this proceeding. If it is the case that existing carriers are engaged in price fixing or price cutting, it is a matter for formal complaint before the PSC, not an application for authority. This type of complaint, if warranted, would be properly made by shippers or competing carriers.

On the above paragraph (> 16, Order No. 6019), Big Z argues on exceptions that price fixing and price cutting leads to less funds for operation, less funds lead to poor maintenance of equipment, and poor maintenance leads to safety concerns. The PSC agrees with the reasoning, however, for the same reasons expressed in regard to fitness, the PSC affirms this ruling by the Hearings Examiner -- absent a showing of inadequate service by existing carriers a potential cause is irrelevant.

Concerning discrimination and state and federal audit practices, all evidence will be excluded, as it is irrelevant to this proceeding. If it is the case that Big Z is being discriminated against or the subject of unreasonable state or federal audit practices, it is a matter for formal complaint before the appropriate agency (including the PSC) or court, not in an application for authority before the PSC.

On the above paragraph (> 17, Order No. 6019), Big Z argues on exceptions that the "clear pattern of discrimination" against Big Z "merely because its president is an Indian, is an

absolute outrage." Big Z asks the PSC to take stock of this situation and honestly assess Big Z's qualifications to fulfill the public need for a new and better carrier regardless of minority status.

The PSC is, without qualification, opposed to discrimination and will exercise and implement all constitutional and statutory provisions to prevent the same so long as it has the jurisdiction to do so. However, the PSC is not the proper forum for deciding the matter as raised by Big Z in this proceeding. The PSC can only ask that Big Z, if discriminated against, take its claims to the appropriate authority. For the purposes of what the PSC has authority over, the PSC is not negatively affected by the race of any party or participant -- this most emphatically includes the present matter and Big Z and the Protestants. This Final Order does not turn on the race of any party.

Concerning minority status and disadvantaged business enterprise (DBE) status, all evidence will be allowed as it is relevant to this proceeding.

Briefing

After Big Z's Applicant's Reply Brief was filed, certain Protestants filed objections and motions to strike portions thereof on the basis that the same were not based on evidence in the record. The objection is sustained, but the motion to strike is denied. Those portions of Applicant's Reply Brief identified in Protestants' objection, insofar as the expressed facts are concerned, have no basis in evidence, but will remain in the brief to the extent that they may include argument bearing on other evidence that is a part of the record.

FINDINGS OF FACT

Facts Primarily Bearing on Fitness

Big Z is a corporation. It employs about 20 people. It owns motor vehicles (approximately 10 tractors and 20 trailers) capable of transporting conventional, polymerized, and rubberized asphalt, and liquid petroleum products. It has business facilities and light repair, maintenance, and inspection shops in Wolf Point and Billings, Montana.

Big Z argues on exceptions that the above finding (> 20, Order No. 6019) should contain a statement that polymerized and rubberized asphalt must be transported in well-insulated trailers because it must be transported at higher tempera tures than conventional asphalt. At this specific point in the findings and evidence upon which it is based the PSC finds no compelling evidence justifying a finding of fact that polymerized and rubberized asphalt must be so transported. However, the PSC notes that later findings regarding testimony of Siegfried Diegel bear on this same matter and will consider this exception again at that point.

Big Z's motor vehicles are seven to eight years old and its trailers are well insulated. Insulation is important -- if a trailer is poorly insulated there is more chance that the load of asphalt will cool and solidify.

Big Z argues on exceptions that the above paragraph (> 21, Order No. 6019) should include a finding that Big Z has never had a load of asphalt setup or freezeup in its equipment. The PSC cannot so find as there is some contrary evidence by Harold Ingram (TR p. 278) and such finding is within the discretion of the Hearings Examiner.

Big Z's financial position as of year ending September 30, 1988 shows total assets of $1,518,403.96, total liabilities of $1,099,838.34, and stockholder's equity of $418,565.62. Net

income at that time was $80,313.40. Big Z's financial position as of year ending September 30, 1989 shows total assets of $1,372,715.01, total liabilities of $713,745.99, and stockholder's equity of $658,969.02. Net income at that time was $240,403.40.

Big Z has been engaged in motor vehicle transportation business since 1986, it holds a Department of Transportation safety rating of satisfactory (there are only two ratings -- unsatisfactory and satisfactory), and is recognized by the state of Montana as a DBE. Big Z has a safety program in effect.

Big Z occasionally receives requests from authorized carriers to transport for them or lease equipment to them.

Big Z argues on exceptions that the above paragraph (> 24, Order No. 6019) is "conclusory" (sic) and should include specific instances. The PSC finds that Big Z has received a number of requests from authorized carriers to transport for them or lease equipment to them. Specific instances exist in the record, but it is unnecessary to set them out as formal findings.

Robert A. Zimmerman is Big Z's president, a director, and majority shareholder. He is a member of the Little Shell Band of Chippewa Indians. Mr. Zimmerman testified that Big Z is doing well financially, is having an excellent year, has the financial resources needed to maintain and operate as a motor carrier under the proposed authority, and the public would be better served by such authority.

Les Keebler is Big Z's vice-president and a shareholder. Mr. Keebler has the opinion that Big Z, because of its well insulated trailers, may provide increased service capabilities.

Big Z argues on exceptions that the above paragraph (> 26, Order No. 6019) should be amended to say "does provide" instead of "may provide." The PSC disagrees that such change is warranted in this context, however the PSC acknowledges that well-insulated trailers do provide increased service capabilities over trailers that are not well-insulated.

Facts Primarily Bearing on Public Need

At this point Big Z requests on exceptions that there be findings of fact relating to increased usage in asphalt between 1987 and 1989 and a doubling of asphalt revenues collectively with Big Z and existing carriers. Although it is true that evidence shows an increased usage in asphalt when 1987 and 1989 are compared, it also shows a decrease between 1988 and 1989 and a decrease when comparing 1984, 1985 and 1986 to 1989. In regard to a doubling of "asphalt revenues collectively generated," in the past three years, the PSC finds that the supporting testimony referenced by Big Z on exceptions relates only to the explanation of an exhibit which was ruled inadmissible. The requested findings cannot properly be made on such referenced basis. However, it appears otherwise in the record that "revenues collectively generated" have increased in the past three years.

Raymond D. Brown, Chief, Civil Rights Bureau, Montana Department of Highways (DOH), was called as a witness by Big Z. From his testimony the following are facts:

a. the DOH sets DBE percentage use goals in particular projects, in compliance with federal law;

b. use of any DBE, of which 145 are registered in Montana, fulfills the requirements of the goals;

c. no interstate (assumed to have meant intrastate) asphalt hauler is currently recognized as DBE; and

d. the DOH has never failed to meet its DBE goals.

On the above finding (> 27, Order No. 6019), Big Z requests on exceptions that the past practices of the Montana Department of Highways (DOH) included a computation of DBE goals on specific projects with a specific allocation made for asphalt haulers and that under present practices of the DOH, if Big Z had an authority, DOH would be able to include Big Z in DBE goals. The PSC so finds.

It is Mr. Brown's opinion that DBE asphalt haulers are not getting their fair share of federal aid highway funds because they do not hold interstate (assumed to have meant intrastate) authority.

Ronald Omo, president of Omo Construction and Big O Construction and Supply, Inc., of Billings, was called as a witness by Big Z. From his testimony, the following are facts:

a. his businesses supply asphalt to the Bureau of Indian Affairs (BIA), Park Service, some airports, and DOH projects; and

b. Big Z is useful and provides assistance in his transportation onto Indian reservations.

Big Z argues on exceptions that the above paragraph (> 29, Order No. 6019), should contain a finding that Mr. Omo testified that he has had problems in the past with transporta tion

services provided by H.F. Johnson. The PSC so finds, but notes that H.F. Johnson, is a former motor carrier no longer in the business.

Mr. Omo did not express a need for Big Z, but did express a sense of support on political and moral grounds.

David Orbe, employed by United Industries, Billings, as manager of Western Materials, Missoula, was called as a witness by Big Z. From his testimony, as manager of Western Materials, the following are facts:

a. his business is construction, ready mix, and sand and gravel for asphalt paving and airport projects with DOH, BIA, and Forest Service; and

b. use of Big Z assists him in filling DBE quotas.

Mr. Orbe did not testify to a need for Big Z, but expressed a sense of support in filling minority quotas.

Siegfried Diegel, employed by Asphalt Supply and Service, Inc., Denver, Colorado, at Laurel, was called as a witness by Big Z. From his testimony, the following are facts:

a. his business retails asphalts of the modified type, primarily;

b. he feels that he needs Big Z for DBE status.

Mr. Diegel's testimony relating to need bears solely on DBE status and transportation of asphalt.

Big Z argues on exceptions that the above two paragraphs (>> 33-34, Order No. 6019) do not adequately convey the relevant testimony of Mr. Diegel as it relates to need for the services of Big Z. The PSC agrees, in part, and supplements these findings with the following.

Mr. Diegel testified that he feels he needs Big Z also for quality of equipment and competition in the area. It is also Mr. Diegel's opinion that, on a national basis, currently 1 to 2 percent of all asphalts are modified with a polymer or other additive. He estimates that by the year 2000 as much as 50 percent of all liquid asphalts will be modified. It is his opinion that rubberized asphalts must be handled and maintained at higher temperatures and must be hauled in well-insulated trailers. He has the opinion that well-insulated trailers increase service area. He also testified that it is difficult to find trucks during a three month season. The PSC notes that in regard to the testimony of Mr. Diegel concerning difficulty to find carriers during the three month period, specifics of the difficulty, including whether all authorized carriers were contacted are absent.

John Twedt, president of Century Construction, was called as a witness by Big Z. From his testimony, the following are facts:

a. his business provides asphalt paving for the Corp of Engineers, Federal Aviation Administration (FAA), and airport work; and

b. he finds it difficult to meet DBE goals and use of Big Z fulfills this.

Big Z argues on exceptions that the above paragraph (> 35, Order No. 6019) should contain findings that the FAA has some of the highest DBE goals ranging from 10 to 13 percent. Big Z argues that findings should express that Big Z has been an important part of Century Construction's business, has been instrumental in Century Construction's FAA work and obtaining FAA work, Century Construction cannot fulfill DBE quotas by using Keller, and Century Construction would receive a higher percentage of DBE credit by using Big Z rather than Mr. Omo's business. The PSC so finds.

Mr. Twedt did not expressly refer to a need for Big Z. However, his testimony implies it to the extent that it is reasonable to predict that he would have stated a need if asked directly. This need applies only to asphalt and only to DBE status.

All of the above witnesses, to the extent that they have used the services of Big Z, have found it to be very good or excellent. All of the above businesses or shipper witnesses support Big Z's application.

Facts Primarily Bearing on Ability of and Effect on Existing Carriers

All of the above witnesses, to the extent that they have used the service of any of the Protestants have found it to be satisfactory.

All of the Protestants hold certificates similar to that proposed by Big Z. All of the Protestants currently conduct transportation operations under the certificates. None of the Protestants is recognized by the state of Montana as Disadvantage Business Enterprise. The PSC supplements this finding (> 39, Order No. 6019), so that this order properly notes the fact, with a finding that there is no evidence demonstrating that the service of the existing carriers is not adequate.

Big Z argues on exceptions that certain proposed findings submitted by Big Z (>> 81, 83-92, 94-105, 107-108, 110-113, Big Z's Proposed Findings of Fact) be incorporated as findings. Upon review, these proposals deal with safety in existing carrier operations, effect of authority in Big Z on existing carriers, recent increases in gross revenues in existing carriers, and requests by existing carriers for Big Z to transport loads. The PSC declines to incorporate these findings as, for

all practical purposes, most of them have been disposed of by previous findings or rulings. However, in regard to the effect of a grant of authority to Big Z on existing carriers, the PSC finds that the testimony on adverse effects or specifics of adverse effects is limited in that, predominantly, the existing carriers did not know the extent to which a grant of authority to Big Z would affect their businesses.

CONCLUSIONS OF LAW

Preliminaries

The PSC has jurisdiction over this matter. See generally, Title 69, Chapter 12, MCA.

The application of Big Z is proper in form. The protests of Drinkwalter, Keller, Black Hills (stipulated out), Hornoi, Dixon Bros., S-B, and Sorlie are proper in form.

The PSC conducted all procedures and proceedings in accordance with law, including all timely and reasonable notice and full and fair hearing requirements. The Applicant and all Protestants were represented by legal counsel.

Applications for Motor Carrier Authority in General

No nonexempt motor carrier may operate for the transportation of persons or property for hire on any public highway of the state of Montana without first obtaining a certificate declaring that public convenience and necessity require such operation. See, Sections 69-12-301 and 69-12-311 through 69-12-314, MCA.

Big Z has applied to obtain such certificate and thereby gain entry into the intrastate motor carrier industry through the grant of authority from the PSC to operate and provide the proposed services to the public as set forth in its application -- Class B, statewide, petroleum, etc.

Entry into the motor carrier industry has long been regulated in Montana. The present general statutory framework for this has existed since Chapter 184, L. 1931, and that was preceded by similar regulation established by Chapter 154, L. 1923.

Operations of motor carriers have also been regulated by the same Acts. Operations are not relevant to applications for entry except insofar as fitness of the applicant may be viewed as to the ability to comply with the law regulating operations if authority is granted.

The legislature has established the law providing for motor carrier regulation. The PSC administers this law as written, exercising that discretion allowed by law.

Regulation of motor carriers for the protection of the public is a legitimate and wise exercise of the police powers of the state. See, Stoner v. Underseth, 85 Mont. 11, 20-21, 277 P. 437, 441 (1929). The public highways belong to the people for use in the ordinary way, but their use for the purpose of gain is special and extraordinary and generally may be regulated. Regulation is reasonably devised to protect the public from abusive use of the roads and from the evils incident to unregulated competition. See generally, Barney v. Board of Railroad Commissioners, 93 Mont. 115, 129, 17 P.2d 83, 85 (1932).

Based on the language of the statutes and case law pertaining to motor carrier regulation, the PSC has viewed the goal or objective of it to be the public interest. The public

interest is not necessarily the interest of an individual motor carrier or shipper, but is collectively all carriers, all shippers, and all of the public.

Furthermore, the public interest carries a sense of being long term. Common in motor carrier regulation, as in other areas of regulation, the public might enjoy immediate benefits of liberal grants of entry into the motor carrier industry as increased competition reduces prices. However, if such benefits are fleeting as motor carriers price each other out of the market and out of the ability to transport as needed, regularly, steadily, and safely, the benefits become serious burdens.

Entry regulation prevents the weakening of motor carriers by preventing superfluous operations and competition that is not required in the public interest (cites omitted). Pan American Bus Lines, Operation, 1 M.C.C. 190, 203 (1936).

Motor carrier regulation does necessarily have a tendency to protect existing motor carriers. However, this is an incident of regulation, not the principal.

Big Z argues on exceptions that the above paragraph (> 52, Order No. 6019) is a misleading, unfair, and biased characterization of motor carrier law generally. The PSC disagrees. The paragraph is a totally accurate statement of this aspect of regulation of motor carriers. However, the PSC views the statement as being nothing more than a comment on "protection of existing carriers" in relation to the preceding paragraphs explaining applications for motor carrier authority in general.

Each application for motor carrier authority must be treated as unique from a factual standpoint. All applications are treated the same from a legal standpoint. The standard for entry is

commonly referred to as the public convenience and necessity standard. This standard has several elements -- public convenience and necessity, fitness, and no harm to existing transportation services. If all of these exist an application is granted. If even one does not exist, the application is denied.

Big Z argues on exceptions that the above paragraph (> 53, Order No. 6019) is incorrect insofar as it states as an element of the public convenience and necessity standard "no harm to existing transportation services." The PSC agrees that this conclusion, although introductory and accurately explained later, is, in strict interpretation, incorrect. The element is more properly stated as "no harm to existing transportation services contrary to the public interest."

The determination on an application for a certificate of public convenience and necessity is primarily governed by Section 69-12-323, MCA. In sum, this statute provides that a certificate shall be granted if the evidence at hearing demonstrates that the public convenience and necessity require the proposed service and consideration of the proposed service being permanent and continuous and the effect of the proposed service on existing transportation services does not disclose adverse aspects or impacts demonstrating that the public interest would be better served by a denial.

The PSC has the benefit of recent Montana case law pertaining to grants of authority. In State ex rel. H.R. Roberts v. Public Service Commission, ____Mont.____, _____, 47 St.Rptr. 774, 780, 790 P.2d 489, 494 (1990), the Montana Supreme Court, in regard to Section 69-12-323, MCA, stated that in granting authority, the PSC must: (1) determine that public convenience and necessity require the authorization of the service proposed and this necessarily includes a consideration of the existing services; (2) consider the ability and dependability of the applicant to

meet any perceived additional public need; and (3) consider the impact that the proposed service would have upon existing transportation services.

This statement is in harmony with the way in which the PSC has long interpreted and applied the standard for new motor carrier authority. However, the PSC has historically separated the first required consideration, primarily for burden of proof analysis, into two parts.

The PSC has historically interpreted and applied the provisions in Section 69-12-323, MCA, in the following fashion: (1) the evidence must demonstrate a public need -- if it does not, the application is denied; (2) if the evidence demonstrates a public need, but existing transportation services can and will meet that need, the application is denied; (3) if the evidence demonstrates a public need that cannot or will not be met by existing transportation services, but the grant of additional authority will harm the operations of existing transportation services contrary to the public interest, the application is denied; and (4) if the evidence demonstrates a public need that cannot or will not be met by existing transportation services and the grant of additional authority will not harm the operations of existing transportation services contrary to the public interest, the application is granted unless the applicant is not fit to conduct transportation services. See generally, In the Matter of Jones Brothers Trucking, Inc., PSC Docket No. T-9469, Order No. 5987(a), p. 8 (July 17, 1990).

Additionally, this analysis used in applying Section 69-12-323, MCA, has frequently been accompanied by a reference to Pan American Bus Lines, Operation, 1 M.C.C. 190, 203 (1936). Pan American, stated that the question in considering new authority is, in substance, whether the new operation or service will serve a useful public purpose, responsive to a public demand or need; whether the purpose can and will be served as well by existing lines or carriers; and whether it can

be served by the applicant without endangering or impairing the operations of existing carriers contrary to the public interest. 1 M.C.C. at 203.

Pan American has been consistently interpreted as establishing three questions to be asked when considering an application for authority; (1) has the applicant established a public need; (2) can existing carriers satisfy that need; and (3) will the proposed service cause the protestants to suffer competitive harm of such degree as to outweigh the benefits to the general public. Liberty Trucking Company, Extension, 131 M.C.C. 573, 574 (1979).

The Pan American case does warrant some discussion, primarily because it is apparently relied on by Big Z as the guiding primary authority for PSC treatment of applications. Pan American is not primary authority in applications before the PSC. It is a federal administrative case dealing with federal law. It and the other federal administrative and court cases referencing it have been and are used by the PSC merely for assistance in interpretation as there has been a degree of harmony between Montana and federal law.

Big Z argues on exceptions that the above paragraph (> 60, Order No. 6019) is incorrect insofar as it states that Big Z relied on Pan American "as the guiding primary authority." It does appear that Big Z relied on the case in the identified fashion (Big Z, Brief in Support, p. 16), however, the PSC will defer to Big Z on this matter of what Big Z relies on as primary authority.

Furthermore, although Pan American generally receives due credit for certain principles underlying motor carrier regulation, including grants of authority, its expressed language can be somewhat misleading if viewed in isolation. Pan American is important for how it has

developed and been inter preted. For this, cases such as Liberty, 131 M.C.C. 573, supra, must be looked to.

Big Z argues on exceptions that the above paragraph (> 61, Order No. 6019), in reference to Liberty, justifies the same treatment of other more recent cases continuing to state that the proposed service must serve "a useful public service, responsive to a public demand or need," the language used in Pam American. The PSC agrees insofar as such cases continue to develop and interpret Pan American in context of theories underlying motor carrier regulation in effect in Montana.

The PSC will continue to apply its traditional analysis as expressed in Jones Brothers, T-9469, supra. Again, this analysis is dictated by Section 69-12-323, MCA, the primary authority, and administrative and court case law interpreting it. To grant an authority to Big Z the evidence must demonstrate: a public need for the proposed services (in terms of public convenience and necessity); that such public need cannot or will not be met by existing carriers; that a grant of authority would not harm existing carriers (in terms of public interest); and, that it is fit to conduct operations.

Each of these requirements will be examined to the extent necessary to properly determine Big Z's application.

Public Need

As explained above, the PSC traditionally has first looked to the showing of public need (in terms of public conve nience and necessity). The evidence must demonstrate this. More completely, the evidence must demonstrate that the public convenience and necessity require the authorization of the service proposed by Big Z. See, Section 69-12-323(2)(a), MCA; see also, H.R. Roberts, 790 P.2d at 494.

In this regard, Big Z has argued that the standard for obtaining a certificate requires a showing that granting of the certificate will further a useful public service, responsive to public demand or need. This argument has its basis in Pan American. As explained above, Big Z's reliance on Pan American is only sound if it contemplates the language expressed in Section 69-12-323, MCA, and the cases interpreting Pan American.

The need or public need that must be demonstrated is that the "public convenience and necessity require" it. Section 69-12-323, MCA. "Public convenience and necessity" is a term possessing connotations which have evolved from nearly a century of experience of government in the regulation of transportation. See generally, Interstate Commerce Commission v. Parker, 326 U.S. 60, 65, 65 S.Ct. 1490, 1492-1493, 89 L.Ed. 2051, 2058-2059 (1946). It implies both "convenience" and "necessity" since the words are not synonymous and must be given a separate and distinct meaning. See, Atlanta and St. Andrews Bay Railway Co., Application, 71 ICC 784, 792 (1922). "Convenience" in the carrier context has been defined as something fitting or suited to the public need, not something handy or easy of ac cess. Black's Law Dictionary, 1393 (rev. 4th ed. 1968). Necessity does not exist unless the inconvenience would be so great as to amount to an unreasonable burden on the public. Atlanta and St. Andrews, 71 ICC at 792. The words imply an urgent,

immediate public need. Id. at 792; see also, Pan American Bus Lines, Operation, 1 MCC 190, 202 (1936).

In any event, public need in the context of being what the public convenience and necessity require, is demonstrated if a real, urgent, immediate need is shown and the public suffers an unreasonable burden without the proposed service. Mere support, preference, handiness, or ease of access are insufficient.

Big Z argues on exceptions that the above two paragraphs (>> 66-67, Order No. 6019) are incorrect insofar as they conclude that the need element in public convenience and necessity means a real, urgent, and immediate need and with unreasonable burden without the proposed service. Big Z argues that this conclusion is antiquated in light of recent changes in federal motor carrier law. Big Z argues that at paragraph 60 of the Proposed Order (No. 6019) the PSC held that "ICC cases are used by the PSC for assistance in interpretation as there has been harmony between Montana and federal law." Big Z points out that there was, in 1980 a radical change in federal motor carrier law, and argues that, although the "cases and language cited ... were all well and good under the limited entry system in effect until 1980," due to changes in federal law, they are "irrelevant in today's world of motor carrier regulation."

The PSC determines that Big Z's arguments on this point must be overruled. However, the PSC notes that paragraph 60 of the Proposed Order (No. 6019) might be misleading. In that paragraph "there has been a degree of harmony" can be construed as presently continuing. This is an incorrect interpretation. It would be correctly stated as "there has been, in the past (or until 1980), a degree of harmony." In 1980, at the federal level, motor carrier regulation did radically change. Montana regulation of motor carriers did not. Prior to 1980 there was a significant degree

of harmony between federal and Montana motor carrier regulation. The cases from that time remain well and good and relevant in today's world of motor carrier regulation, but not at the federal level. Administrative rulings and case law interpreting the new federal regulation of motor carriers is generally inapplicable to Montana motor carrier regulation.

Ideally for Big Z, as for any applicant, in regard to demonstrating public need, witnesses would have appeared and testified that they were shippers of the commodities in the areas proposed by Big Z in its application, that they have a need for transportation services for the commodities in the areas, that they have at times contacted existing carriers and the existing carriers could not or would not reasonably fill their needs, and that with Big Z their needs would be met. With this type of evidence, the public need element is usually met unless overcome by the protestants' evidence or found inherently incredible.

This did not occur. The testimony was limited, qualified, and confined. Mr. Diegel and Mr. Twedt were the only witnesses demonstrating some form of need for the services proposed by Big Z. The need was confined only to asphalt. The need was focused not on Big Z as a carrier, but Big Z as a DBE. Furthermore, from all appearances, Big Z is presently filling the needs of these witnesses through some form of brokerage or buy and sell arrangement.

Big Z argues on exceptions that the above paragraph (> 69, Order No. 6019) is clearly in error. Big Z argues that there is no requirement under Montana law that "dozens of shippers" must testify to need and that, under federal motor carrier regulation, the testimony of a single shipper can establish need. Big Z argues that it demonstrated that there is a need for its services, the need is not confined to asphalt, and the need is not confined to DBE. Big Z argues that its "presently filling the needs of these witnesses through some form of brokerage or buy and sell arrangement"

is evidence that a public need exists. Big Z argues that Mr. Omo testified not only as to asphalt, but as to light fuels.

The PSC is not persuaded by these arguments. Big Z has applied for a statewide Class B authority for numerous commodities. Absolutely no testimony as to need references any thing but asphalt. Although it is true that, as Big Z points out, Mr. Omo referenced light fuels, Mr. Omo was not a witness expressing a need for Big Z's services. There was testimony as to a form of need, it was provided by witnesses Mr. Diegel and Mr. Twedt. It most clearly must be confined to DBE status and nothing else as far as need is concerned. The reference for need in regard to well-insulated trailers and quality of service demonstrates nothing without a corresponding clear showing that the existing carriers are incapable in the same regard. There is no such showing and need cannot exist.

The PSC also disagrees with Big Z's argument that its present filling of the needs of these witnesses through a brokerage or buy and sell arrangement establishes a need. The contrary is true. If a particular requirement for services is being met without authority, there simply is no need for a grant of authority to fill the need.

The nature of the evidence on need requires a discussion of four issues before a determination can be made. Each of these are identified and discussed below.

Whether Two Shipper Witnesses can Establish Public Need for a Class B Statewide Authority

A Class B statewide authority is broad. If granted, Big Z could haul for any shipper in the state for the commodities proposed. There are presently six authorized carriers who protest Big Z's application. These carriers can and do provide Class B statewide transportation services for the commodities proposed, just as Big Z would.

For there to be a public need, it would seem reasonable that shippers would be able to testify to a broader need for authority. Without such testimony the need for broad authority is questionable. Given the limited number of shippers testifying, it is reasonable to conclude that the existing authorized carriers generally appear to be satisfactorily filling the statewide need.

If only two shippers express a need, doubt is cast on whether a Class B statewide is warranted. If any authority is granted to Big Z it should necessarily take this into account.

Big Z argues on exceptions that the above two paragraphs (>> 72-73, Order No. 6019) are incorrect as there is no requirement under Montana law which states that a certain number of shippers must testify as to need. Big Z argues that it had shippers from a representative number of points and that it was difficult to obtain shipper testimony because of intimidation. The PSC is not persuaded. Again, only two witnesses testified as to need and the need was confined to DBE status of Big Z. Big Z's assertion of intimidation of other potential shipper witnesses is without basis and is incredible. With the procedure available for compelling witness attendance, with Big Z not using those procedures, the PSC can only conclude that the difficulty in Big Z's producing shipper support rests on some other reason.

Whether Evidence of Need Relating Solely to Asphalt Can Establish Need for a Class B Statewide Authority for Petroleum, Petroleum By-Products, LPG, Crude, and Residual Fuels

Big Z applied for Class B, statewide, petroleum, petroleum by-products, LPG, crude, and residual fuels. Although the evidence contains discussions concerning Big Z's ability to transport all of these commodities, in relation to need there is no evidence pertaining to anything but asphalt.

Given the evidence on need being confined to asphalt only, if any authority is granted it should necessarily take this into account.

Whether Testimony Relating to Need Not Being a Need for Another Authority, but a Need for a Carrier with DBE Status Can be the Basis for Granting of a Class B Statewide Authority

All testimony relating to need was not based on any general need for another authority, but solely upon a need for a carrier with DBE status. This limits the analysis.

Big Z argues that its DBE status is unique to it in comparison to the Protestants. Big Z argues that there is a need for Big Z's services because, with it, shippers will be able to fill DBE percentage requirements in projects requiring such, by contracting with Big Z. Big Z submits that without DBE status the existing carriers cannot be responsive to the public demand and need for a DBE carrier.

The PSC does not discount DBE status, but must observe that but for it Big Z established no need. Even considering Big Z's DBE status, the evidence of need is rather weak.

Big Z argues on exceptions that two of the above three paragraphs (>> 76 and 78, Order No. 6019) are incorrect insofar as there is a conclusion that the only need expressed relates

to DBE status. Big Z continues to argue that one witness, Mr. Diegel, testified to a need for well-insulated trailers and high quality equipment. Again, such expression of need, to meet the standards applicable must be accompanied by evidence demonstrating that the existing carriers cannot fill the need. Such evidence does not exist. Mr. Diegel's testimony can amount to no more than a preference for Big Z. Preference is not need.

Montana statutory provisions on human rights provide that it is unlawful for the state to deny a privilege because of race, creed, etc. See, Section 49-2-308, MCA. Montana statutory provisions on human rights provide that it is unlawful for the state to deny or grant a license because of race, color, etc. See, Section 49-3-204, MCA. All regulatory power is to ensure equal treatment of all persons. See, Section 49-3-204, MCA. The DBE status of Big Z is exclusively based on race.

Minority preference may not be the sole basis for the issuance of a certificate. National and state goals of minority preference may be considered insofar as they actually affect public transportation needs. See generally, In the Matter of Carol A. Mann, PSC Docket No. T-7380, Order No. 4790a, Final Order, May 16, 1984. However, to grant an authority to Big Z solely on the basis of DBE status would violate Section 49-3- 204, MCA. The PSC finds this statute to be controlling in this case.

Big Z argues on exceptions, in regard to the above paragraph (> 80, Order No. 6019), that Big Z has never asked the PSC to grant it an authority solely on the basis of DBE status. The PSC does not assume that Big Z has. However, the point that must be focused on at this time in the proceeding is that the record shows, if there is a need for Big Z's services as a asphalt motor carrier, the need is for Big Z's DBE status.

Big Z also argues on exceptions that Montana law has as its purpose the elimination of discrimination. Big Z argues that state agencies must do whatever they can to eliminate discrimination and must not be a party to any such discrimination. The PSC agrees totally, but cannot relate the arguments to the present case.

Whether there Can be a Public Need for an Additional Authority When the Need is Presently Being Filled Through Other Means

Mr. Diegel and Mr. Twedt both testified as to some need. However, both also indicated that they are presently being served by Big Z, without Big Z having motor carrier authority, through some form of brokerage or buy and sell arrangements.

Big Z makes exception to the above paragraph (> 81, Order No. 6019) for the same reasons as discussed previously in regard to a prior paragraph (> 69, Order No. 6019). The PSC adopts its same response.

Although brokerage and buy and sell arrangements can be illegal under certain circumstances they also can be legal under others. This case concerning the application of Big Z for authority has not included a detailed analysis of the brokerage or buy and sell arrangements pertaining to Big Z. The PSC is not expressing any opinion on the legality of these arrangements.

The necessity for a DBE to satisfy highway project requirements is also highly questionable. None of the shippers testifying in support of the application stated that they had ever failed to satisfy the DBE requirements. The evidence also disclosed that the DBE requirement can

be satisfied by firms providing any type of work on a project, and is not limited in any manner to transportation services.

In any event, the testimony or need for authority in Big Z appears somewhat questionable, if not inaccurate, given that the need is being filled without authority.

Big Z argues on exceptions, in regard to the above two paragraphs (>> 83-84, Order No. 6019), that future need precludes a statement such as the "necessity for a DBE to satisfy highway project requirements is also highly questionable." The PSC does not find sufficient proof of future requirements so as to justify finding or concluding that the situation today in regard to the need for Big Z's services will not be the same in the foreseeable future.

Ability in Existing Carriers to Fill Need

As pointed out generally, the PSC has traditionally analyzed the ability of existing carriers to fill a demonstrated public need separately from establishing need. It is unnecessary for the PSC to consider the ability of existing carriers to fill any need here, since the PSC has determined that there is no need and the public convenience and necessity does not require the authorization.

Big Z argues on exceptions to the above paragraph (> 85, Order No. 6019) that the PSC has not determined that there is no need for Big Z's services. Big Z points to several previous paragraphs referencing an existing need. The PSC disagrees. Although previous paragraphs reference a need, each reference is qualified, and in the final analysis, whatever need exists is not that type of need for which a certificate can issue.

Fitness

In determining whether a certificate should issue, the PSC must give consideration to the ability and dependability of the Applicant to meet any perceived additional public need. H.R. Roberts, 790 P.2d at 494. This requirement concerns fitness of the Applicant. It is unnecessary for the PSC to consider the fitness of Big Z in this case, since the PSC has already determined that the public convenience and necessity does not require the authorization.

Big Z argues on exceptions that in regard to the above paragraph (> 86, Order No. 6019) that the PSC should reach a determination on fitness. A need for Big Z's services being not shown, it is unnecessary to determine fitness.

Harm to Existing Transportation Services

In determining whether a certificate should issue the PSC must give consideration to the transportation service being furnished by existing transportation agencies. H.R. Roberts, 790 P.2d at 494; see also, Section 69-12-323(2)(a), MCA. It is unnecessary for the PSC to consider transportation service being furnished by existing transportation agencies (beyond that done above) as the PSC has already determined that the public convenience and necessity does not require the authorization.

Big Z argues on exceptions that in regard to the above paragraph (> 87, Order No. 6019) the PSC should reach a determination. No need warranting the issuance of authority existing, it is unnecessary to reach a determination.

SUPPLEMENTARY COMMENT

Although no assurances can be made as to the proper outcome of such matter, Big Z might be well advised to at least review the provisions of law pertaining to Class C motor carriers. Although the record reflects no reason to grant a Class B authority as requested or in part or on special terms and conditions as provided in Section 69-12-323(3), MCA, the record does provide some indication that Big Z might be able to establish a proper case for obtaining a limited Class C authority. If Big Z is interested in this avenue it should contact the PSC staff to discuss the matter completely before making application.

ORDER

All conclusions of law are incorporated herein.

All objections, motions, requests, proposals, arguments, findings, conclusions, and like matters not otherwise ruled on during proceedings or addressed and ruled upon herein or otherwise disposed of by this order are denied.

Further applications for any authority denied herein may be denied without hearing unless it appears that the conditions at the time of such application have materially changed and the public convenience and necessity then require the motor carrier operation. See generally, Section 69-12-321(4), MCA.

The PSC determines, after being fully apprised of all premises, that the application of Big Z, Inc., proposing operations as a "Class B" intrastate motor carrier providing services "between all points and places in the state of Montana" in the transportation of "petroleum,

petroleum byproducts, LPG, crude, and residual fuels" is not required by the public convenience and necessity and is DENIED.

Done and Dated this 22nd day of August, 1991 by a vote of 3-2.

BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION

_____
HOWARD L. ELLIS, Chairman

_____
BOB ANDERSON, Commissioner

_____
WALLACE W. "WALLY" MERCER, Commissioner

_____
DANNY OBERG, Vice Chairman
(Voting to Dissent)

_____
JOHN B. DRISCOLL, Commissioner
(Voting to Dissent)

ATTEST:

Ann Peck
Commission Secretary

(SEAL)

NOTE: Any interested party may request that the Commission reconsider this decision. A motion to reconsider must be filed within ten (10) days. See ARM 38.2.4806.

DISSENT OF COMMISSIONER DRISCOLL

August 21, 1991

FINAL ORDER NO. 6019a, DOCKET NO. T-9511

I dissent from this order because the Commission is only reluctant to move into strange ground for the transportation scene. We need to develop some policy in this area, regardless of whether or not anyone has before us.

I think the Commission should award a Class B certificate based upon the government regulatory requirements (i.e. DBE quotas) faced by testifying shippers. Shippers need persons or corporations qualified to provide transportation services, also qualified as DBE's. If the Commission is unwilling to stand behind the legitimacy of the existing brokerage arrangements, then the Commission has no business saying the shipper needs are (legitimately) being met.

This matter has nothing to do with race. An otherwise fit transportation corporation could also be awarded a certificate because of the need for government approved security clearance not otherwise available with exiting couriers.

Authority granted for these special reasons must be transferable only to otherwise fit corporations or persons that also meet these same additional qualifications. This way the Commission can insure that the shipper need that originally gave rise to the authority, is perpetually satisfied.

Respectfully,

John Driscoll
Commissioner